

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

03 Cr. 294 (RPP)

- against -

OPINION AND ORDER

RAMIRO LOPEZ-IMITOLA,

Defendant.

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ROBERT P. PATTERSON, JR., U.S.D.J.

On May 8, 2006, this Court received a letter dated May 5, 2006 from Mr. Lopez-Imitola's present counsel, Salvador Delgado, Esq., stating that Mr. Lopez-Imitola was complaining to him that he had received ineffective assistance of counsel from his two prior attorneys, and attaching a copy of a letter to the Court from Mr. Lopez-Imitola requesting a three-month adjournment of his sentencing, as well as a copy of the letter translated by the Southern District of New York interpreter's office. Mr. Delgado's letter argued that the enhancements proved at the Fatico hearing have to be proved to a jury beyond a reasonable doubt under the Sixth Amendment and the holding in United States v. Manuel Gonzalez, 420 F.3d 111 (2d Cir. 2005). The letter of May 5, 2006 also stated that Mr. Lopez-Imitola would now like to testify about enhancement and mitigating factors under 18 U.S.C. § 3553(a), such as coercion.

On May 8, 2006, at a Court conference, the Court advised Mr. Delgado that Mr. Lopez-Imitola's statements through an interpreter did not amount to a motion, and stated, "If you want to make a motion on grounds, please make a motion on grounds, but it's got to be here in the

next day or so, because we've got to go ahead." Transcript of May 8, 2006 ("Tr. 5/8/06") at 20. Thereafter, Mr. Delgado agreed to make all submissions by May 17, 2006. Id. at 21-22.

On May 16, 2006, the government filed a brief with enclosures showing (1) the Defendant had respectively waived his right to testify at the Fatico hearing and chosen to make a sentencing submission to the Court; and (2) the Sixth Amendment does not limit the Court's authority to make factual determinations relevant to the Defendant's advisory guidelines range. On May 17, 2006, defense counsel made no submissions or motions.

At a hearing on May 18, 2006, Mr. Delgado presented the Court with a Motion for New Fatico Hearing (the "Motion"). The Motion, which purports to claim ineffective assistance of counsel, is not accompanied by an affidavit from the Defendant stating the facts supporting this claim and is consequently deficient on its face. The motion, which could more properly be called a "memorandum of law," states, "We are preparing a second motion with supporting memorandum of law which we hope to file in the next few days to document the ineffective assistance of counsel of Mr. Lopez' prior two attorneys." Motion at 1. The Motion for a New Fatico Hearing then argues that enhancements to the guidelines must be proved beyond a reasonable doubt, citing United States v. Manuel Gonzalez, supra, and Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

At the hearing on May 18, 2006, Mr. Delgado stated that the defense now wished to call Alexandra Lopez to rebut the testimony of Marlene Escobar at the Fatico hearing. The Court instructed counsel to get its motion to reopen the Fatico hearing filed by the following day. Transcript of May 18, 2006 ("Tr. 5/18/06") at 11.

Counsel for Defendant, having failed to file any motion to reopen the Fatico hearing on May 19, 2006, as ordered by the Court on May 18, 2006, the Court concludes that counsel for

Defendant has withdrawn its request that the Court hear testimony of the Defendant's daughter, as well as that of the Defendant at such a hearing and has abandoned its ineffective assistance of counsel claim. Accordingly, the hearing on May 26, 2006 at 11 a.m. will be devoted to argument of Defendant's motion for the Court to make its finding on the enhancements by the "beyond a reasonable doubt" standard, as argued in its motion papers, and if time allows, review of the evidence supporting each of the enhancements sought by the government.

Any application for the Court to consider anything else should be made by 5:30 p.m. today.

IT IS SO ORDERED.

Dated: New York, New York
May 25, 2006


Robert P. Patterson, Jr.
U.S.D.J.

Copies of this Opinion and Order sent to:

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